Supreme Court, U.S.
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No. 94-1535

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CLAUDE C. COUNCIL, JR.,
TRUSTEE FOR JBS CONTRACTING INC.,
A DEBTOR IN BANKRUPTCY,

*Petitioner,*

*v.*

ANJO CONSTRUCTION COMPANY,
A PENNSYLVANIA CORPORATION,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE PENNSYLVANIA SUPERIOR COURT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Court should exercise its extraordinary supervision to review a Pennsylvania intermediate appellate court's interpretation of a private contract pursuant to state law.

## RULE 29.1 STATEMENT

Anjo Construction Company ("Anjo") has no parent company and no corporate subsidiaries.

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## STATEMENT OF THE CASE

Anjo was the prime contractor under a contract with the Pennsylvania Department of Transportation to build a portion of the East Street Expressway. JBS Contracting Inc. ("JBS") was a subcontractor who entered into two nearly identical construction contracts (hereinafter the

"Contract") with Anjo to complete a portion of the project. When JBS failed to become prequalified and could not perform most of the work under the Contract, Anjo forwarded to JBS a notice that since JBS would be unable to perform, Anjo was cancelling the Contract. JBS initiated this breach of contract claim.

The Contract contains a termination clause in Article 7 which provides that JBS may terminate the Contract at any time by written notice to JBS (the "Termination Provision" or "Article 7.") App. at A17.[1] Under the Contract, if Anjo terminated JBS pursuant to Article 7, JBS was entitled to be paid for all materials furnished and work performed at the date of termination on a pro-rata basis, but JBS was not entitled to profits for the uncompleted portion of the Contract.

The Contract also includes a second termination clause, which applies to different situations than the Termination Provision, and provides that if JBS fails to meet Anjo's schedule, or fails to perform efficiently and expeditiously, Anjo reserves the right to terminate the Contract, hire other subcontractors, or complete the work using its own forces and backcharge JBS (the "Negligent Subcontractor Termination Provision.") App. at A17. The Termination Provision focuses on the remedy, or lack thereof, available to JBS in the event of its termination for any reason. The Negligent Subcontractor Termination Provision, on the other hand, describes the remedies available to Anjo in the event JBS failed to meet its schedule or perform competent work.

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[1] JBS' Petition for Writ of Certiorari will be cited herein as "Petition." Citations to the decision of the Superior Court and to other portions of the Appendix to the Petition will be cited in the form of "App. at A."

Following an adverse jury verdict and the grant of partial relief to its post trial motion, Anjo appealed to the Pennsylvania Superior Court. The Pennsylvania Superior Court vacated the judgment of the trial court and remanded the case for entry of judgment notwithstanding the verdict. App. at A21. The Superior Court relied solely on Pennsylvania contract interpretation principles in holding that Article 7 clearly allows Anjo the right to terminate JBS for any reason. App. at A18-21. The Superior Court also emphasized that because JBS' complaint is for breach of contract premised on Anjo's alleged breach for termination without cause, and Anjo could contractually terminate JBS without cause, Anjo did not breach the Contract. App. at A21. It is this routine interpretation of state contract law which JBS now seeks to have reviewed by the Court.[2]

## ARGUMENT

### I.

### THE PENNSYLVANIA SUPERIOR COURT'S DECISION DOES NOT PRESENT ANY OF THE RECOGNIZED BASES FOR CERTIORARI.

A writ of certiorari may be properly issued when a state court of last resort decides a federal question in conflict with a decision of another state court of last resort or of a United States court of appeals. Supreme Court Rule 10.1(b). Certiorari also may be granted when the state court of last resort decides a question of federal law which has not been, but should be, settled by the

[2] After the decision by the Superior Court, JBS requested rehearing by the Superior Court, which was denied; petitioned the Pennsylvania Supreme Court for allowance of appeal, which was denied; and petitioned the Pennsylvania Supreme Court for reconsideration, which was denied. App. at A22-24.

Court. Supreme Court Rule 10.1(c). The Court should only grant a writ of certiorari in cases "involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

The issue posited by Petitioner does not warrant the grant of a writ of certiorari because the Pennsylvania Superior Court merely exercised its appellate review in interpreting a private contract pursuant to state law. JBS' claim against Anjo is based on breach of contract. App. at A14. In reaching the state law contract issue, the Superior Court was not requested to and did not decide any questions of federal interest. There is not one reference to the United States Constitution, any federal statute or any federal regulation within the Superior Court's opinion. Because the opinion below involves the application of well-settled principles of Pennsylvania contract interpretation over the meaning of a provision in a private contract, there is no basis for certiorari.

JBS baldly concludes that the Superior Court's opinion conflicts with federal law and decisions of the Court. Petition at 16. Nevertheless, JBS provides no authority for any so-called conflict. Indeed, there is no conflict with the general contract interpretation principles relied on by the Superior Court.

## II.
## THE COURT DOES NOT HAVE JURISDICTION TO REVIEW THE ISSUES RAISED BY PETITIONER.

JBS claims that the Code of Federal Regulations and the Supremacy Clause of the United States Constitution prohibits the enforcement of Article 7. Petition at i. JBS fails to meet its burden of establishing that those federal issues were properly raised and considered below. *Street v. New York*, 394 U.S. 576, 582 (1969). The Court does not have jurisdiction to exercise appellate power over state court judgments unless a federal question was raised and considered by the state court below. *Yoakim v. Miller*, 425 U.S. 231, 234 (1976); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969).

JBS has not demonstrated that the issues it raises to the Court were presented on a timely basis to the Superior Court or considered by that court. As noted earlier, the Pennsylvania Superior Court did not resolve or even consider any federal questions. Moreover, JBS did not properly raise any federal question before the Superior Court.

Although JBS claims that the affirmative action issue was presented to the Superior Court (Petition at 12), JBS did not argue on Anjo's appeal to the Superior Court, as it now does, that the so-called affirmative action requirements of 49 C.F.R. Part 23 or the United States Constitution prohibit the enforcement of the Termination Provision. App. at A38-39. Instead, JBS first claimed that the Termination Provision is unenforceable under 49 C.F.R. Part 23 or the Constitution when it applied for reargument before the Superior Court, petitioned the Pennsylvania Supreme Court for allowance of appeal and applied for reconsideration of the denial of allowance of

appeal to the Pennsylvania Supreme Court. App. at A39-43.

A federal issue is properly raised only when the issue was pursued on appeal as required by the state's law. *Beck v. Washington*, 369 U.S. 541, 549-551 (1962). In Pennsylvania, a party which waits for a request for reargument to present an issue to the Superior Court has waived its right to raise that issue. *Bell v. Koppers Co., Inc.*, 392 A.2d 1380, 1387 (Pa. Super. 1978); *United States v. Prasse*, 261 F.Supp. 760, 761 (E.D. Pa. 1966). Because JBS did not argue to the Superior Court that Article 7 was unenforceable as a result of any alleged affirmative action requirements or the United States Constitution until it requested reargument, it waived the right to raise a federal issue and there is no basis for the Court's jurisdiction. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (The attempt to raise a federal question at a petition for rehearing is untimely, unless the court actually addresses and acts on the issue.)

Moreover, the Pennsylvania Supreme Court refused to even consider the issue now raised by JBS. App. at A23-24. When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. at 582. JBS did not and cannot demonstrate that it presented any federal question for review in a timely fashion.

## CONCLUSION

For the foregoing reasons, Anjo respectfully requests this Court to deny JBS' Petition for Writ of Certiorari.

Respectfully submitted,

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